IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, *Petitioner,*

v.

THE OHIO POWER COMPANY

MOTION FOR CONSIDERATION BY THE FULL COURT AND PETITION FOR REHEARING

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On April 1, 1957, an order issued in this case granting the Government's petition for rehearing, vacating the prior order denying certiorari, granting the petition for certiorari and summarily reversing the judgment below. This was announced in a *per curiam* opinion concurred in by only four members of this Court.

In entering this judgment—and entirely apart from the issue of finality as to which three Justices dissented—the Court took three unprecedented actions. First, it granted a petition for rehearing by concur-

rence of only a minority of the Court without regard for the plain provisions of Rule 58(1); second, again by a minority, it reversed the judgment below on the merits without the participation of two eligible and qualified members of the Court in spite of uniform precedent and practice to the contrary; finally—and possibly inadvertently—the same minority reversed the judgment of the Court of Claims without leaving open for that court's further consideration important questions never reached or passed upon by that or any other court, again contrary to established precedent and practice. The Ohio Power Company earnestly and respectfully suggests that proper judicial procedure requires that the judgment of April 1 be reconsidered, and moves that the matter be examined by the full Court.

REASONS FOR GRANTING RESPONDENT'S MOTION AND PETITION

1. Rule 58(1) of the Revised Rules of this Court provides, in pertinent part:

> "A petition for rehearing is not subject to oral argument, and will not be granted, except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court."

On December 5, 1955, the Government's first and only timely petition for rehearing was considered by the full Court and denied. Almost 16 months later, on April 1, 1957, that petition for rehearing was granted, but by only four members of the Court. This granting of a petition for rehearing with a concurrence of only a minority of the Court is contrary to Rule 58(1), and is a departure from the practices of the Court which have uniformly prevailed prior to this action.

Since 1933, when both the denial and the granting of petitions for rehearing were first recorded in the published records of this Court, some 125 petitions for rehearing have been granted. We believe we have examined them all, and that we can therefore say that during that period, and up to the order in this case, no petition for rehearing has been granted contrary to the mandate of Rule 58(1)—*i.e.*, by less than a majority of the Court. Although a Justice who was not a member of the Court at the time of the original decision is usually noted as not participating in the order granting rehearing,[1] we have found no case in which such an order was concurred in by less than a majority of the Court, as specifically required by Rule 58(1).

This is not, we submit, an accidental circumstance. Rule 58(1), in requiring a majority of the Court, rests on the obvious proposition that no rehearing should be granted unless there is at least a majority who are willing to re-examine the decision which has been reached. To state the obvious example, rehearing of a decision reached by a vote of 8 to 1 would serve

[1] E.g., *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 323 U.S. 690, 326 U.S. 801; *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 349 U.S. 901, 349 U.S. 926; *United States* v. *Nunnally Investment Co.*, 313 U.S. 584, 314 U.S. 705; *R. Simpson & Co., Inc.* v. *Commissioner of Internal Revenue*, 317 U.S. 677, 319 U.S. 778; *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 348 U.S. 880, 349 U.S. 70; *Indian Towing Co., Inc.* v. *United States*, 349 U.S. 902, 349 U.S. 926. In addition, of course there are a number of instances in which a Justice who was a member of the Court throughout the relevant period did not participate in either the original decision, the order granting rehearing, or the subsequent decision on the merits, presumably because he considered himself disqualified by interest, prior participation, or other valid consideration.

no useful purpose if only one of the 8 were to favor it, since even were that one Justice to be persuaded by reargument to change his vote, the prior decision would not be changed.

The basis for the rule requiring a majority of the Court is no less valid when there has been a change in the membership of the Court. We show below that the rehearing itself, when once granted, has always been before the full Court as then constituted (see pp. 6-8, *infra*). Consequently, there is the same need for assurance that Justices constituting a majority of *that* Court—the Court who will make the decision on the merits after rehearing has been granted—are willing to re-examine the Court's prior order. There is therefore no basis for an interpretation of Rule 58(1) which would make "majority of the Court" mean only a majority of those members of the Court as presently constituted who happen to have participated in the prior action. Such a majority can be, and is in this instance, only a minority of the Court at the time of reconsideration. Granting a petition for rehearing with the concurrence of only a minority of the members of the Court as then constituted gives none of the assurance, which Rule 58(1) is designed to give, that the rehearing will not be futile.

We earnestly submit, therefore, that even were this an ordinary case, Rule 58(1) should be adhered to, and the action of the minority of the Court in granting the petition for rehearing should be vacated.

This is anything, however, but an ordinary matter, and apart from the plain requirements of Rule 58(1) and of sound judicial administration, there are cogent reasons for submitting this particular petition for

rehearing to the whole Court. The question of finality under the provisions of the Judicial Code and this Court's Rules is plainly one of great importance to the sound administration of justice. This Court's order of April 1, 1957, concurred in by only a minority of the Court, will have a profound and unfortunate effect on both litigants and practitioners before this Court. A successful litigant may remain subject to harassment by a tenacious opponent for years; even the most responsible counsel for a losing litigant, on the other hand, will have the greatest difficulty in honestly advising his client not to try one more petition or motion to reopen or continue his lost cause. No such precedent should be permitted to stand without at least the concurrence of a majority of the Court.[2]

Moreover, it is significant that the decision of this procedural issue turns, not upon matters before the Court at the time of the original decision, but entirely upon new issues not then presented. The question is not one which has anything whatever to do with the merits of the particular controversy, but has to do solely with the interpretation of the finality provisions of the Judicial Code and of this Court's rehearing rule. It was not, and by its nature could not have been, presented to the Court at the time the Government's original petition for certiorari was considered in the autumn of 1955. In its present posture the question was first presented by this Court's

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[2] Our arguments on this important procedural question are set out in detail in briefs heretofore filed in this proceeding and will not be repeated here. See "Brief in Opposition to Motion of the United States to File a Petition for Rehearing," filed May 16, 1956; "Motion to Vacate Order of June 11, 1956, and to Dismiss Petition for Rehearing filed November 10, 1955," filed October 12, 1956.

order entered *sua sponte* on June 11, 1956, continuing the Government's petition for rehearing of denial of certiorari on the docket, and was first decided by this Court's order of April 1, 1957, reconsideration of which by the full Court is now sought. Clearly, under these circumstances, the rationale of any practice pursuant to which individual Justices not participating in the original decision do not participate in a petition for rehearing would have no application.

2. Upsetting and startling as the Court's action is in granting the Government's petition for rehearing under these circumstances, its further action in reversing the judgment of the Court of Claims by vote of only a minority of the Court represents an even more undesirable innovation in practice. The reversal of the judgment of the Court of Claims obviously constitutes a vote by the Court on the merits of the case. Thus, the case has been decided, but not by a majority of the Court. A minority of four, with two qualified Justices not participating, issued a final order in which a majority of the Court did not concur.

This is a departure from a settled custom of the Court which we believe has never heretofore been ignored. At least since 1933, in the approximately 125 petitions for rehearing which have been granted during that time by this Court, reconsideration of the merits has always been had before the full Court, including any Justices not otherwise disqualified who had become members of the Court since the initial decision.[3] There

[3] For example, in *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 327 U.S. 661, Mr. Justice Burton participated in and dissented from a decision handed down after rehearing although he had not been a member of the Court at the time the case was originally heard, 325 U.S. 711, and had not participated in consideration

is simply no precedent for the proposition that a Justice who was not a member of the Court at the time of the prior consideration should not, or does not, sit on the subsequent consideration of the case after petition for rehearing has been granted. Indeed, the instant case is *a fortiori;* the prior action by the Court which was reconsidered—the denial of certiorari—did not involve the merits. That issue had not had prior consideration by *any* members of the Court.

This settled practice was ignored when the Government urged, and a minority of the full Court decided, that this case be summarily disposed of on the authority of two recent decisions of this Court, *United States v. Allen-Bradley Co.,* 352 U.S. 306, and *National Lead Co.* v. *Commissioner,* 352 U.S. 313. Respondent has urged and continues to urge that even though the certifying agency had statutory authority to promulgate its excess war cost regulation of October 5, 1943, as this Court has now held in *Allen-Bradley* and *National Lead,* this regulation was inapplicable to Ohio Power Company's facility. This is a substantial question

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of the order granting rehearing, 326 U.S. 801. Similarly, in *R. Simpson & Co., Inc.* v. *Commissioner,* certiorari was denied before Mr. Justice Rutledge had become a member of the Court, 317 U.S. 677; although he did not take part in the consideration of the order granting rehearing, 319 U.S. 778, he participated in consideration of the merits of the case on rehearing and joined in the dissent, 321 U.S. 804. The same practice was followed by Mr. Justice Harlan in *Indian Towing Co., Inc.* v. *U. S.,* 349 U.S. 926, 350 U.S. 61; and *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.,* 349 U.S. 926, 350 U.S. 124. Cf. also, *Kellogg Company* v. *National Biscuit Co.,* 305 U.S. 111, in which both Mr. Justice Stone and Mr. Justice Roberts participated in consideration of the merits of the case on rehearing although neither had participated in the denial of the original petition for certiorari, 302 U.S. 733, or in the decision granting certiorari on rehearing, 304 U.S. 586.

which, under the unbroken practice of this Court, should not be determined on the merits by less than all of the eligible members of the Court as then constituted. Respondent has never been heard on this question, either on full briefs or on oral argument, by any court; the issues obviously should not now be summarily disposed of by a minority of the Court. An opportunity to be heard and considered by the full bench seems clearly appropriate. At the very least, all eligible members of the Court should consider the limited question, discussed below, of whether the judgment of this Court may properly stand without being amended to leave this issue open on remand of the cause to the Court of Claims.

3. Finally, Respondent respectfully urges that the judgment of this Court of April 1, 1957, should at least be amended to remand the cause to the Court of Claims for further proceedings not inconsistent with the decisions of this Court in the *Allen-Bradley* and *National Lead* cases. Compare *D. H. Mitchell* v. *United States*, 348 U.S. 905, and *Union Trust Co., et al.* v. *Eastern Air Lines, Inc.*, 350 U.S. 962.

The original decision of the Court of Claims[4] rested entirely on the earlier decision of that court in *Wickes Corporation* v. *United States*, 123 Ct. Cls. 741, 108 F. Supp. 616 (1952), which in turn was based solely on a holding that the War Production Board was without statutory authority to promulgate its excess war cost regulations. There is no doubt that that ground of decision has now been destroyed by this Court's decisions in *Allen-Bradley* and *National Lead*.

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[4] Reproduced in Appendix B, p. 19 of the Government's "Petition for a Writ of Certiorari" filed in this case on August 11, 1955.

The significant fact, however, is that apart from statutory authority there remain important and complex questions of applicability to Ohio Power Company's facility of the regulations of the War and Navy Departments, as was required by Executive Order 9406—questions which were never reached or considered by the Court of Claims because its ground of decision made their consideration unnecessary. Accordingly, in all fairness those questions should be left open on remand of this case to that Court. Under circumstances such as this the Court has recognized that an error by a lower court on one issue should not prejudice the parties on other issues, and has reversed or vacated the judgment below and remanded the case for further proceedings consistent with this Court's opinion. *Cahill* v. *New York, N. H. & H. R. Co.*, 351 U.S. 183; *Union Trust Co., et al.* v. *Eastern Air Lines, Inc.*, 350 U.S. 962; *Boudoin* v. *Lykes Bros. S.S. Co., Inc.*, 350 U.S. 811; *Calmar S.S. Corp.* v. *Scott*, 345 U.S. 427; *Dean Milk Co.* v. *Madison*, 340 U.S. 349; *United States* v. *Interstate Commerce Commission*, 337 U.S. 426; *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 337 U.S. 656; *Maggio* v *Zeitz*, 333 US. 56. Indeed, in the *Eastern Air Lines* case this action was taken on a petition for rehearing following a judgment of simple reversal, as here, and in both the *Boudoin* and *Cahill* cases the obvious necessity that all questions be resolved by the courts led this Court to make even out-of-time changes in its mandate so that questions presented to the lower courts but not reached by those courts were left open on remand by the amended judgments.

The nature of these issues relating to the applicability of the regulations—the issues which were not decided by the Court of Claims—has been stated in some

detail in earlier papers filed in this case.[5] Some brief additional comments, however, seem warranted. The *per curiam* opinion of April 1, 1957, emphasizes the importance of "uniformity in the application of the principles announced" in the *Allen-Bradley* and *National Lead* cases. The judgment as entered, however, violates rather than furthers this principle. Ohio Power has *not* been accorded treatment under Section 124 of the Internal Revenue Code of 1939 uniform with that which has been given all other taxpayers who began construction or made acquisition of emergency facilities between January 1, 1940, and October 5, 1943.

As pointed out in our earlier briefs referred to above, Ohio Power began its construction of the Tidd project emergency facility in August 1943. Between January 1, 1940 and October 5, 1943, when the Secretaries of War and Navy were the certifying authorities under Section 124, thousands of taxpayers started construction of emergency facilities or applied for necessity certificates, and an excess-war-cost limitation was *never* imposed.[6] All of these thousands of taxpayers, except Ohio Power, have been permitted to amortize 100 percent of the cost of the certified facilities,[7] which can be established beyond any doubt upon a

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[5] "Motion to Vacate Order of June 11, 1956, and to Dismiss Petition for Rehearing Filed November 10, 1955," pp. 20-44, filed October 12, 1956; "Brief of Respondent in Opposition to Petition for Rehearing," pp. 4-15, filed February 12, 1957.

[6] It can be proved on remand that on the few occasions where a partial certificate was issued by the Secretaries the entire facility was not necessary in the interest of National defense. The certificate issued to Ohio Power was not such a certificate as the entire plant was determined to be necessary.

[7] In both *Allen-Bradley* and *National Lead* all construction work or acquisitions and the filing of applications with respect thereto took place after October 5, 1943.

remand to the Court of Claims. These 100 percent certificates were issued by the Secretaries of War and Navy in accordance with their regulations as adopted and approved by the President. On October 5, 1943, the regulations of the Secretaries of War and Navy were amended[8] to provide for the first time that if an emergency facility had presumptive post-war use, with respect to construction commenced after that date only the excess war cost over normal cost of constructing the facility would be amortizable under Section 124, but with respect to construction commenced prior to October 5, 1943, the so-called "excess war cost" limitation was not to be applied. Subsequently, when the certifying authority was transferred from the Secretaries of War and Navy to the War Production Board, the Executive Order of transfer (E.O. 9406 dated December 17, 1943)[9] specifically provided:

> "3. (a) The regulations of the Secretary of War and the Secretary of the Navy in effect prior to October 5, 1943 shall govern the issuance of Necessity Certificates for all applications for Necessity Certificates describing facilities the beginning of the construction, reconstruction, erection, installation or the date of acquisition of which was prior to October 5, 1943."

This Executive Order established beyond any doubt that a new rule was adopted on October 5, 1943, because if a change had not taken place there would have been no necessity for providing in the order that construction started and acquisitions made before October 5, 1943, should be controlled by the regulations of the

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[8] "Appendix to Brief of Respondent in Opposition to Petition for Rehearing," p. 11, filed February 12, 1957.

[9] Id. at p. 2.

Secretaries of War and Navy rather than the regulations of the War Production Board. It is clear and beyond dispute that taxpayers who had commenced construction of emergency facilities prior to October 5, 1943, as had the Ohio Power Company, were to be accorded different treatment from those, like *Allen-Bradley* and *National Lead*, who had commenced construction or made acquisitions after that date.

Accordingly, applicable principles of uniformity and "the interests of justice" referred to in the *per curiam* opinion require at least that respondent be given the opportunity it has not previously had in any court to present the merits of this substantial question. In the cases of *Allen-Bradley, National Lead* and *Wickes, supra*, all of whom began their construction or made their acquisitions of emergency facilities after October 5, 1943, the Government introduced the affidavit of Sidney T. Thomas, Chief of the Amortization Section of the War Production Board, which stated that the new regulation of October 5, 1943 was not made retroactive "out of fairness to the applicant who had already spent his money . . ."[10] In these three cases only the regulations, practices and policies of the War Production Board were involved. Respondent's case involves the regulations, practices and policies of the War and Navy Departments, which, under Executive Order 9406 above, should have been applied to respondent's certificate. In view of the record in *Allen-Bradley* and *National Lead*, and especially the sworn statement of Thomas that the new regulation was not to be applied retroactively, respondent should be per-

[10] Id. at p. 16.

mitted to show that its certificate was mistakenly issued under WPB regulations instead of under the regulations of the War and Navy Departments, and that the WPB acted in violation of the Executive Order.

The substance of the Thomas statement above was given wide publicity on October 5, 1943.[11] Relying on the published statements that the new regulation would not be applied retroactively and on the War and Navy Departments' regulations and the Executive Order, the respondent spent millions of dollars on the construction of the Tidd project before the WPB issued its certificate on November 9, 1944 limiting its amortization deduction to excess war cost in violation of Excutive Order 9406. With construction so far advanced, and in view of its contractual commitments for the project, respondent had no real choice, as did *Allen-Bradley* and *National Lead,* on whether or not to proceed with the construction. Withdrawal was not possible.

We submit that under these circumstances justice and fairness require that respondent at least be accorded an opportunity to prove on remand to the Court of Claims that under the regulations of the Secretaries of War and Navy, as they existed prior to October 5, 1943 and the practice and policy pursued thereunder, it was entitled to amortize the full cost of the Tidd plant; that the entire facility was determined to be necessary; and that the sole reason for the limitation on the amortizable cost was the new excess war cost limitation adopted for the first time as a result of the

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[11] Id. at p. 17.

amended regulation of October 5, 1943, which was mistakenly applied here in violation of Executive Order 9406.

CONCLUSION

Respondent respectfully urges that this Court's judgment of April 1, 1957, be reconsidered by all of the present members of the Court, including Mr. Justice Brennan and Mr. Justice Whittaker, and upon such reconsideration:

(1) that the Government's petition for rehearing of denial of certiorari be dismissed or denied as inconsistent with the principles of finality established by the Judicial Code and this Court's Rules;

(2) alternatively, that if that portion of the judgment of April 1, 1957, granting rehearing of the denial of certiorari and granting a writ of certiorari remains unchanged, the question presented on the merits as to the effect on Ohio Power of the decisions in *Allen-Bradley* and *National Lead* should be considered by the full Court, and, before decision is reached, should be set down for oral argument, and

(3) as a further alternative, if the Court deems it inappropriate to hear oral argument on the effect on this case of the *Allen-Bradley* and *National Lead* decisions, that in any event its judgment of April 1, 1957, summarily reversing the Court of Claims, should be amended to provide for remand of the cause to the Court of Claims for further proceedings not incon-

sistent with the opinions of this Court in *Allen-Bradley* and *National Lead.*

Respectfully submitted,

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I certify that both this Petition for Rehearing and Motion for Consideration by the Full Court are presented in good faith and not for delay and that the Petition for Rehearing is restricted to the grounds specified in Rule 58.

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